

## **REMARKS**

Filed concurrently with this response is a Request for Continued Examination and fee pursuant to 37 C.F.R. § 1.114. This paper is being filed in response to the Office Action mailed on August 28, 2009 (the "Office Action").

### **STATUS OF THE CLAIMS**

Claims 1-7, 10, 11, 17-20, 23, 24, 27-68 are pending in the Application. Claims 8-9, 12-16, 21, and 22 are canceled. Claims 1, 2 4-7, 17, 19, 20, 23, 24, 27-34 are amended herein. Claims 37-68 are new.

In the Office Action, claims 1-20, 23, 24, and 27-33 stand rejected under 35 U.S.C. § 102 as purportedly being anticipated by U.S. Patent No. 6,628,809 to Rowe et al. Claims 17-18 stand rejected under 35 U.S.C. § 103 as purportedly being unpatentable over Rowe in view of U.S. Patent No. 4,582,985 to Lofberg ("Lofberg"), and in further view of U.S. Patent No. 4,614,861 to Pavlov et al. ("Pavlov"). Claim 19 stands rejected as purportedly being unpatentable over U.S. Patent No. 4,582,985 to Schmitt et al. ("Schmitt") in view of Rowe. Claims 35 and 36 are allowed. Claim 34 is objected to as being dependent upon a rejected base claim.

In light of the amendments and remarks herein, reconsideration of the pending claims is respectfully requested. The Applicants believe that this response places the Application in condition for allowance and respectfully request the same.

### **EXAMINER INTERVIEW**

The Applicants thank Examiner Nguyen for the interview held on October 20, 2009. In the interview, the Applicants presented the new claims 37-68, which include features that the Examiner had indicated would be allowable if rewritten in independent form. The Applicants also discussed a potential amendments to independent claims 1, 11, 12, 17, 19, 20, 23, 24.

### **CLAIM REJECTIONS UNDER 35 U.S.C. § 102**

Claims 1-20, 23, 24, and 27-33 stand rejected under 35 U.S.C. § 102 as purportedly being anticipated by Rowe. A claim is properly anticipated under 35 U.S.C.

§ 102 only if “each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference.” MPEP §2131, *citing Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628 at 631 (Fed. Cir. 1987); emphasis added. “The identical invention must be shown in as complete detail as is contained in the . . . claim.” MPEP §2131, *citing Richardson v. Suzuki Motor Co.*, 868 F.2d 1226 at 1236 (Fed. Cir. 1989); emphasis added.

Since Rowe fails to teach or suggest a biometric sensor, “configured to measure a specific, internal, sub-epidermal physiological process of a user from which a biometric marker of said user may be determined,” the Applicants respectfully traverse the rejection of claims 1,2 4-7, 17, 19, 20. Claim 1; *also see* claims 11, 17, 19, and 20.

Rowe does not teach or suggest measuring a physiological process as recited in the claims. In contrast, Rowe discusses a “tissue spectra” that does not correspond to any specific structure and/or process occurring within the user. Rowe Abstract. Rowe states that user verification is based on the tissue spectral data, which is not a measurement of a specific internal structure, much less a process as recited in the claims. Rowe reads:

“[t]he present invention is based on Applicant’s recognition that an accurate, precise and repeatable tissue spectra of an individual in the near infrared range contains spectral features and combinations of spectral features which are unique to that individual.” Rowe col. 4 lines 58-62; emphasis added.

Rowe states that the “spectral features” do not relate to and/or measure any specific structure or process occurring within the user. Id. In fact, Moreover, Rowe does not state, that the spectra is related to any process within the user:

“Water is by far the largest contributor to absorption … tissue greatly scatters light because there are many refractive index discontinuities in a typical tissue sample…” Rowe col. 5 lines 48-57.

“The light energy contacting the skin surface is differentially absorbed by … various component and analytes …” Rowe col. 8 lines 45-48.

As illustrated above, the Rowe tissue spectrum does not correspond to any specific structure, much less a process as recited in the claims. See claims 1,2 4-7, 17, 19, 20. Therefore, the Applicants respectfully traverse the rejection of claims 1,2 4-7, 17, 19, 20.

## **CLAIM REJECTIONS UNDER 35 U.S.C. § 103**

Claims 17-18 stand rejected under 35 U.S.C. § 103 as purportedly being unpatentable over Rowe in view of Lofberg and Pavlov. Claim 19 stands rejected as purportedly being unpatentable over Schmitt in view of Rowe. The Applicants do not believe, nor does the Office Action purport, that Lofberg, Pavlov and/or Schmitt cure the defects of Rowe with respect to claims 1, 11, 17, 19, and/or 20. Therefore, the Applicants respectfully traverse the rejection of claims 17, 18, and 19, since, if an independent claim is nonobvious, any claim depending therefrom is nonobvious. See In re Fine, 837 F.2d 1071 (Fed. Cir. 1988); *also see MPEP § 2143.03.*

## **NEW CLAIMS 37-68**

Claims 37-68 recite features identified in the Allowable Subject Matter portion of the Office Action. Accordingly, the Applicants respectfully submit that the new claims 37-68 represent patentable subject matter for at least the reasons provided in the Office Action.

## **GENERAL CONSIDERATIONS**

By the remarks provided herein, Applicants have addressed all outstanding issues presented in the Office Action. Applicants note that the remarks presented herein have been made merely to clarify the claimed invention from elements purported by the Office Action to be taught by the cited references. Such remarks should not be construed as acquiescence, on the part of Applicants, as to the purported teachings or prior art status of the cited references, nor as to the characterization of the cited references advanced in the Office Action. Accordingly, Applicants reserve the right to challenge the purported teachings and prior art status of the cited references at an appropriate time.

### **CONCLUSION**

For the reasons discussed above, Applicants submit that the claims are in proper condition for allowance, and a Notice of Allowance is respectfully requested. If the Examiner notes any further matters that may be resolved by a telephone interview, the Examiner is encouraged to contact John Thompson by telephone at (801) 578-6994.

DATED this 30 day of November, 2009.

Respectfully submitted,

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